NEW YORK STATE BAR ASSOCIATION

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Divorce & Separation

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The unprecedented increase in the marriage failure rate during this century and the latter part of last century has had its effect, directly or indirectly, on virtually every family in the country. The following information is designed to briefly summarize New York State's divorce laws.

Marriage is a civil contract. The state has an interest in preserving marriages. Accordingly, the marriage relationship only can be dissolved by a court, by either a divorce or an annulment. It also may be altered by a decree of separation granted by our courts. In any case, there must be a proceeding in the Supreme Court (which contrary to conventional thinking is not the highest court in New York State, but rather the trial court of general jurisdiction) in which the person seeking the divorce, separation decree or annulment must prove a basis for the divorce.

Pursuant to legislation signed into law by the Governor of New York State in 2010, New York will now grant a divorce when there has been an irretrievable breakdown of the marriage, for six (6) months or longer joining the rest of the country in instituting "no-fault" divorce.[1]

New York continues to have what is called a conversion divorce mechanism whereby parties can obtain a divorce pursuant to a separation decree or a separation agreement for more than a year and the party seeking the divorce has substantially complied with the terms of the separation decree or the separation agreement. Additionally, other fault grounds exist as noted below.

In order to get a judgment of separation, pursuant to DRL § 200, a party must prove cruel and inhuman treatment, abandonment, non-support, adultery or imprisonment.

What are the grounds for divorce?

Four of the "grounds" in this state are based on the fault of one of the parties:

(1) cruel and inhuman treatment;

(2) abandonment for one or more years;

(3) imprisonment for three or more years; and

(4) adultery.

The other ("no fault") grounds are:

(1) one year of living apart under a separation agreement;

(2) one year of living apart under a separation decree granted by a court;

(3) an irretrievable breakdown of the marriage for a period of at least six months, provided that one spouse has so stated under oath.

1. Domestic Relations Law (DRL) § 170(7).

These "no fault" grounds afford New Yorkers a basis to get a "no-fault" divorce, in which neither spouse is judged to be at fault. Unquestionably, the "no fault" laws will provide a disincentive for people who wish to challenge the basis for the divorce.

New York's "No Fault" Ground: What is "irretrievable breakdown of the marriage"?

An irretrievable breakdown of the marriage allows one spouse, unilaterally, to end a marriage and to do so without the agreement of the other spouse. However, the 2010 law provides that a court cannot grant a judgment of divorce unless and until the economic issues of the marriage are dealt with.

To prove the ground of irretrievable breakdown of the marriage the party seeking the divorce must demonstrate that: (1) the relationship between husband and wife has broken down irretrievably; (2) for a period of at least six months; (3) provided that one spouse states this under oath; and (4) proves that the "economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the minor children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce."[2]

The statute does not define what is meant by a "marriage has broken down irretrievably," but it is likely New York courts will look at what other states in the United States have done where there are similar laws.

What is "cruel and inhuman treatment"?

Cruel and inhuman treatment can involve either physical or mental cruelty. To be a reason for divorce, the treatment must have such a serious effect on the physical or mental health of the divorce-seeking spouse that it is not safe or proper for the parties to continue the marriage.

Some examples of acts that courts have held to be cruel and inhuman treatment for divorce purposes include physical attacks upon a spouse; constant screaming, profanity or other verbal abuse; gambling away the household funds; staying away from the house too often without an explanation; going out with another man or woman; and wrongfully accusing the other spouse of adulterous relations with another man or woman.

2. DRL § 170(7).

Alcoholism, by itself, usually is not a sufficient basis for divorce, unless your spouse becomes cruel or violent when intoxicated, so that you fear for your health and safety.

Mental illness also is not a sufficient basis for a divorce on the grounds of cruel and inhuman treatment; unless a spouse's other behavior could be defined as "cruel and inhuman treatment." However, mental illness is not a defense to cruel and inhuman treatment. Nevertheless, a court may declare a marriage void when a spouse has been incurably mentally ill for a period of five (5) years or more.

The courts have held that when there is long-term marriage (often fifteen or more years married) the acts of cruelty must be more substantial to justify a divorce. What might be cruel in a short marriage may not be sufficient basis for divorce in a more mature marriage relationship.

Each case, however, stands on its own facts. The court decides whether or not these facts justify a dissolution of the marriage. Generally, the acts or conduct on which the divorce is based must have occurred within five years prior to the commencement of the action to be considered by the court.

What does "abandonment for one or more years" mean?

Abandonment means that your spouse has intentionally left you without your consent, and of his or her own accord (that is, you did not force or lock your spouse out of the house) and without justification.

You must also prove that your spouse had no good reason for leaving (such as your ill treatment or your consent), that your spouse left with the intention of never returning, and that your spouse did not offer in good faith to return.

Unjustified refusal by a spouse to have sexual relations is also considered a "constructive abandonment" and may also be considered cruel and inhuman treatment.

Abandonment must exist for a continuous period of at least one year before the action is started to be a basis for divorce in this state. There is no statute of limitations on abandonment, but it will depend on specific facts such as health issues, livelihood, compelling family obligations or other reasons.

However, a separation agreement eliminates the ground of abandonment, since when both parties sign an agreement, they consent to living apart.

What is the basis of divorce if a spouse has been in "imprisonment for three or more years"?

Divorce on the grounds of imprisonment for three or more years means that the defendant actually must have served three years or more in prison before an action can be brought; even if the conviction is later overturned or reversed.

What is adultery?

Bringing an action on the ground of adultery, especially if your spouse is going to contest it, is not a simple matter. The proof of adultery here is difficult. Generally, you are not permitted to testify against your spouse, and you must have a witness ready to convince the court that your mate did engage in sexual relations with another person. Adultery is usually proven by circumstantial evidence, that is, by showing that your spouse had the opportunity, inclination and intent to engage in sexual relations with the other person.

In addition, there are four defenses to the charge of adultery, and if any of these are proven, the court will deny the divorce:

1. "Procurement" or "connivance" - Procurement means that one spouse actively encouraged the other to commit adultery. Connivance is similar to "collusion" or "consent" by a spouse to the adultery.
2. "Condonation" or "forgiveness" - Having sexual relations with your spouse after discovery of his or her adultery is an absolute defense to your divorce action based on the adultery.
3. "Statute of Limitations" - This means that there is a time limit (five years from your discovery of the first unforgiven act of adultery) for you to bring the divorce action.
4. "Recrimination" - This defense means that you, too, were guilty of adultery. No matter how convinced the court is that adultery was committed by both parties, it is forbidden from granting a divorce on grounds of adultery. Thus, if each spouse proves the adultery of the other, neither can obtain a divorce against the other on that ground.

What about living apart and separations?

Living apart, without a formal written agreement of separation or a court judgment of separation, is not recognized as a ground for a New York State divorce, no matter how long you continue to live separately.

Regarding separations, there are only two valid ways to dissolve a marriage. Each requires separation of one or more years. The law requires that you and your spouse live apart either under a written contract of separation or under a court judgment of separation and the spouse seeking the divorce must have substantially complied with the terms of the agreement or judgment.

What is a separation agreement?

A separation agreement is a detailed contract which should be prepared by attorneys, where the parties agree to live separate for the rest of their lives. It should set forth the respective rights and duties of husband and wife with respect to the custody and access to children, support payments, distribution of property, and all other matters pertaining to the marital relationship.

Certain vital formalities must be carefully followed, or the written agreement will not qualify as a ground for divorce. Here, the skill and experience of the attorneys for the husband and wife are uniquely valuable in helping them reach an agreement which will be fair, just and reasonable to both parties and their children.

The agreement or a memorandum of the agreement is filed (with complete confidentiality) with the clerk of the county where either spouse lives. At the end of one year from the date of the agreement, either spouse may file and serve a summons against the other for a "no-fault" divorce.

All that must be proven to the court is that the agreement was duly executed and acknowledged and was properly filed; that the spouses have in fact lived apart during the period of the agreement up to the time of the divorce action; and that the plaintiff has substantially complied with the terms of the separation agreement. The court will grant a divorce based on that proof.

What is a separation decree?

Another form of separation is through a judgment of separation granted by the Supreme Court. This judgment is based on the same four "fault" grounds as for divorce. However, the abandonment may be for less than a year. In addition, "non-support" is a ground for a decree of separation, although not for a decree of divorce.

One year after the filing of the court's judgment of separation, either party may sue for a "no-fault" divorce, based upon one year of living apart. A divorce does not occur automatically after a year. Court action must be taken.

What is an annulment?

An annulment is granted when a marriage is voidable or void from the beginning, that is to say, there was a defect at the time the parties entered into the marriage, enabling the court to render it invalid. Grounds for annulment are as follows:

Fraud: It may be annulled where the consent was obtained by fraud, provided the fraud was such that it would have deceived an ordinarily prudent person and was material to obtaining the other party's consent. The fraud must be such as to go to the essence of the marriage contract. Only the injured spouse, their parent, or their relative with an interest to avoid the marriage can obtain the annulment on this ground. Fraud claims include, but are not limited to: misrepresenting one's religious denomination or the intensity with which one practices; concealing one's inability to procreate, secretly carrying a disease or genetic disorder that would increase the risk of procreation; coercing one's husband into entering a marriage based on a false declaration of paternity; misrepresenting sexual proclivities; and physically being incapable of consummating the marriage.

Non-age: Both parties must be over the age of 18 years, unless a party is between 16 and 18 years old and has parental consent to marry; or is under 16 years and has both parental consent and court approval to marry. No person under the age of 14 years may marry under any circumstances. A marriage between persons under the age of 18 may be annulled, at the discretion of the court, if the spouse under 18 wants an annulment, or an action may be maintained not only by the underage spouse, but also by either their parent or guardian.

5 years of incurable insanity: If during the marriage, either party becomes incurably insane for five years or more, the marriage can be annulled. However, the sane spouse may be required to support the insane spouse for life.

Mental Incapacity: A marriage may be annulled if one or both of the parties suffered from mental illness or retardation at the time the marriage was entered into. This ground is waived if the moving party remains in the marriage after their incapacity is cured.

Duress: The parties must knowingly consent to the marriage. It may be voided if either spouse consents to marry as a result of the force or duress

of the other spouse; or if either spouse cannot understand the commitment they are about to make. This is also known as lack of consent. However, subsequent cohabitation, or evidence of forgiveness on the part of the coerced spouse may disable their ability to plead under this ground.

Already married: If a spouse gets married before their previous marriage was legally dissolved or annulled, then the present marriage will be void.

How can a marriage be dissolved if a spouse has been missing?

Where your spouse is absent and missing for five years or more, you may bring a special proceeding in Supreme Court to dissolve the marriage. You must prove that your spouse has been absent for five successive years, without being known to be alive; that you believe that your absent spouse is dead; and that you made efforts to discover that he or she is still living, but no evidence proving otherwise was found. After the dissolution becomes final, the reappearance of your absent spouse does not revive your marriage.

PROPERTY DIVISION
What is the equitable distribution law?

Division of assets and the fixing of support are covered by the Equitable Distribution Law. The statute is founded on the philosophy that a marriage, especially one of long term duration, is an economic as well as a social partnership. Two classes of property were created, known as "marital" and "separate" property. Marital property is all property acquired during the marriage (regardless of how title is held), except inheritance, gifts from third persons, compensation for personal injuries and property acquired after the start of a divorce action.

Marital property and marital debts are distributed between spouses in a dissolution action on flexible and equitable principles. Valuation of marital property may require expert advice. The distribution of marital property and the award of support as a result of matrimonial negotiations or proceedings may involve complicated and vital tax consequences to both parties which require expert advice.

SUPPORT AND FEES
What is spousal maintenance, child support and when does a court award counsel fees?

(a) Alimony and/or Spousal Maintenance

Alimony or Spousal Support under the statute is referred to as "maintenance," and based upon various factors set forth in the statute may be permanent or

limited in duration. Maintenance generally falls under two categories, which are: maintenance to be paid while the action of divorce is pending—called pendente lite or temporary maintenance; and maintenance that is disbursed after the divorce in a post-divorce maintenance award.

Commencing as of October 12, 2010, when awarding temporary maintenance, the court must follow the Temporary Maintenance Guidelines, which will only result in a temporary maintenance award when there is an income gap between the two parties. The spouse with more income must have at least two thirds greater income than the spouse with less income.

There are two potential calculations the court will make when deciding an award for temporary maintenance. In the first calculation, the court will determine the temporary maintenance award by subtracting 20% of the payee's (the spouse seeking maintenance) income from 30% of the payor's (the spouse paying maintenance) income. Alternatively, in the second calculation, the award is determined by taking 40% of the parties' combined income and subtracting the payee's income from that total. The result of both these calculations which is the lesser amount is the presumptive temporary maintenance award, but if the result is less than or equal to zero, the maintenance award will also be zero dollars.

However, the payor's income will be capped at $500,000. Thus, any income of the payor that exceeds $500,000 will not be included in the determination of temporary maintenance. If the court wishes to include additional income beyond the $500,000 cap, it may do so based upon the consideration of 19 factors. Moreover, if the court finds that after its calculations, the presumptive award is unjust or inappropriate; it may adjust the presumptive award accordingly, based on the consideration of 17 factors.

Post-divorce spousal maintenance may be awarded to either party based upon a number of factors including the prior standard of living of the parties, the present and future earning capacity of the parties, and the ability of the party seeking spousal maintenance to become self-supporting. The spousal maintenance awarded may be for a limited period of time or for an indefinite period of time. Furthermore, the parties may, by written agreement, waive the right to spousal maintenance.

Notably, during the 2010 Session of the New York legislature, the following factors were added for the court's consideration in determining the amount and duration of maintenance: the need of one party to incur education or training expenses, which would allow them to join the workforce; the existence and

duration of a premarital joint household or a pre-divorce separate household; the presence of children of the marriage in the respective homes of the parties; the care of the children or the stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity; and the inability of one party to obtain meaningful employment due to age or absence from the workforce.

(b) Child Support

The basic child support obligation to be paid by the non-custodial parent is usually based upon a percentage of the combined parental income. For one child the amount is 17%, for two children 25%, for three children 29%, for four children 31% and for five or more children, the child support award will be no less than 35%. In addition to the basic child support obligation, the non-custodial parent may be obligated to pay for a portion of the child care expenses related to the custodial parent's employment or education which would lead to employment. Health care expenses for the children are apportioned between the parents based upon their combined parental income. The non-custodial parent also may be directed to pay for educational expenses. However, if the amount of the basic child support obligation is unjust or inappropriate, the non-custodial parent's pro-rata share of the child support obligation may be determined by other factors and not by the percentages mentioned above. The parents may avoid the use of the percentages in determining the amount of child support by executing an agreement setting forth the amount of child support which they believe to be fair. An agreement determining the amount of child support must satisfy certain technical provisions of the Child Support Standards Act. A lawyer can help the parties comply with these technical provisions. Neither parent has any obligation to support a child once the child reaches 21 years of age. Child support may end before 21 years of age under certain circumstances such as the gainful employment of the child or the child's willful refusal to maintain a relationship with the noncustodial parent. Child support will be awarded by a Family Court as part of a child support proceeding or by Supreme Court as part of a divorce, separation, or annulment proceeding. Even if there is no matrimonial judgment awarded, the court will make an award of child support to the custodial parent.

(c) Counsel Fees

In 2010, the New York legislature also amended the law, creating a rebuttable presumption that counsel fees will be awarded to the spouse with less money. This allows the court to ensure that both

parties are adequately represented from the beginning of the action. The parties and their attorneys are required to submit a sworn statement, or affidavit, to the court with financial information, including the cost of each respective attorney, enabling the court to make a determination. Additionally the wealthier spouse will also be presumed to pay fees of any expert witness called at trial. It will be up to the parties to agree to a sum, or a court to order a sum for counsel fees, depending on the circumstances of your case.

Matrimonial Rules of Practice

There are rules in matrimonial cases, many of which concern client-attorney relationships and much of which should expedite and streamline court process. Some of these Rules include the following:

1. Prior to signing a retainer, a lawyer must give every matrimonial client a written statement of the Client's Rights and Responsibilities,[3] which is included at the end of this pamphlet.
2. Representation requires a written retainer which must ultimately be filed with and reviewed by the Court.
3. There are no non-refundable retainers in matrimonial proceedings. However, minimum fees are permissible if they meet certain standards.
4. Security interests (mortgages, confession of judgment) by your attorney must be specified in the Retainer Agreement and only are permitted by court order, once the opposing party is given notice.
5. Every sworn statement must be certified as truthful by the attorney. Most lawyers require clients to verify that the client has provided truthful information. If you tell your lawyer anything which will be contradicted by sworn statements in your case, the lawyer cannot certify anything which the attorney knows to be untruthful.
6. Fee disputes are now subject to binding arbitration if the client initially determines to seek arbitration.

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3. According to Ethics Opinion #258 issued by the New York State Bar Association's Committee on Professional Ethics, it would be improper for a lawyer to represent both spouses at any stage of the marital problem, even with full disclosure and informed consent of both parties, no matter how "friendly" the matter may appear on the surface.

7. Expedited court proceedings (sometimes known as "fast track" cases) will be utilized. Many cases which do not involve complicated matters (complex cases sometimes involve economically valuing closely held businesses) will be tried within six months after the court holds a preliminary conference. These conferences will be scheduled shortly after the first legal papers are served. Expert reports and responses will be served before trials.

These and other changes in the way contested matrimonial matters are handled should make the process more effective for everyone.

Statement of Client's Rights (As adopted by the Administrative Board of the Courts)

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.
2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).
3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.
4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at least every sixty (60) days. You may refuse to enter into any fee arrangement that you find unsatisfactory. In the event of a fee dispute, you may have the right to seek arbitration; your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.
6. You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.
7. You are entitled to have your legitimate objectives respected by your attorney; including whether or not to settle your matter (court approval of a settlement is required in some matters).
8. You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.
9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Code of Professional Responsibility (sic).
10. You may not be refused representation on the basis of race, creed, color, age, religion, sex, sexual orientation, national origin or disability.

Statement of Client's Responsibilities

Reciprocal trust, courtesy and respect are the hallmarks of the attorney-client relationship. Within that relationship, the client looks to the attorney for expertise, education, sound judgment, protection, advocacy and representation. These expectations can be achieved only if the client fulfills the following responsibilities:

1. The client is expected to treat the lawyer and the lawyer's staff with courtesy and consideration.
2. The client's relationship with the lawyer must be one of complete candor and the lawyer must be apprised of all facts or circumstances of the matter being handled by the lawyer even if the client believes that those facts may be detrimental to the client's cause or unflattering to the client.
3. The client must honor the fee arrangement as agreed to with the lawyer, in accordance with law.
4. All bills for services rendered which are tendered to the client pursuant to the agreed upon fee arrangement should be paid promptly.

5. The client may withdraw from the attorney-client relationship, subject to financial commitments under the agreed to fee arrangement, and, in certain circumstances, subject to court approval.
6. Although the client should expect that his or her correspondence, telephone calls and other communications will be answered within a reasonable time frame, the client should recognize that the lawyer has other clients equally demanding of the lawyer's time and attention.
7. The client should maintain contact with the lawyer, promptly notify the lawyer of any change in telephone number or address and respond promptly to a request by the lawyer for information and cooperation.
8. The client must realize that the lawyer need respect only legitimate objectives of the client and that the lawyer will not advocate or propose positions which are unprofessional or contrary to law or the Lawyer's Code of Professional Responsibility (sic).
9. The lawyer may be unable to accept a case if the lawyer has previous professional commitments which will result in inadequate time being available for the proper representation of a new client.
10. A lawyer is under no obligation to accept a client if the lawyer determines that the cause of the client is without merit, a conflict of interest would exist or that a suitable working relationship with the client is not likely.

This pamphlet, which is based on New York law, is intended to inform, not to advise. No one should attempt to interpret or apply any law without the aid of an attorney. Produced by the New York State Bar Association in cooperation with the Public Service and Education Committee of the Family Law Section.

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